regarding the application of the doctrine set forth in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) ("exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to §1983").

On January 22, 2003 [Docket-Nos. **149, 150**] the District Court declined to exercise jurisdiction over PRHTA's contractors that shared responsibility for the Improper Drainage and all aspects of the design, construction, and management of the highway project –thereby raising issues over the application of the State-Action doctrine, e.g. *West v. Atkins*, 487 U.S. 42 ("if the state delegates its obligations to a private actor, the acts conducted in pursuit of those delegated obligations are under color of law.")

Further, also on January 22, 2003 [Docket-No. **148**], the District Court proceeded to strike some of this Plaintiff's pleadings solely upon the defendants' attorneys' allegations that this Plaintiff could not submit *pro se* pleadings. The District Court struck this Plaintiff's [Docket-No. **133**] "Motion To Request Judgment By Default [...] For Multiple Violations of FRCivP; Also For Completion Of Discovery And Trial Within 90 Day Period; And A Hearing [...]". The District Court also struck this Plaintiff's [Docket-No. **134**] "Memorandum Of Law On [...] Codefendants Deficient Pleadings, Bad Faith, And Other Violations of The FRCivP"; as well as striking this Plaintiff's [Docket-No. **142**] "Informative Motion And Request For A Hearing [...]". While the District Court struck these pleadings, it did not act *sua sponte* to address the issues.

12. In light of the withholding and delay of Discovery, in April 2003 this Plaintiff submitted a Petition for Writ of Mandamus [docketed as 03-1543] requesting that the Court of Appeals order the District Court to support the Castro family requests for the pending discovery items. In June 2003 the Court of Appeals denied this request.

13. One year later, in March 2004 the District Court submitted its opinions in case 03-1287 RLA. A Temporary Restraining Order (TRO) had been requested at the time the Complaint was filed; yet this was not addressed by the District Court in over a year of litigation –and was denied only upon dismissal of the Complaint. On March 16, 2004 [Docket-No. 47] the District Court denied the requested TRO. Two days later, on March 18, 2004 [Docket-No. 48, 49] the District Court dismissed the Complaint purportedly as a matter of jurisdiction. However, the claims regarding the new incarnation of the Improper Drainage; and the liability associated with PRHTA, Codefendant Fernando Fagundo, and Codefendant Barrett & Hale are hardly addressed and do not appear to have been dismissed at all.

14. None of the District Court's Orders have properly addressed the matter of the Improper Drainage in any of its incarnations. Thus it is particularly incongruous that on March 18, 2004 [case 00-1970 RLA Docket-Nos. 174, 175] the District Court attempts to dismiss the *initial* Improper Drainage issues on the basis of matters that arose years later in the subsequent case – and which cannot possibly apply retroactively to the previous situation that took place more than three (3) years earlier.

15. Despite three (3) years of separation between the cases at hand, the final disposition of both cases by the District Court occurred in March 2004. A timely Notice of Appeal in case 03-1287 RLA [Docket-No. 51] was entered on April 6, 2004; and the Honorable Court of Appeals for the First Circuit designated this as Appeal 04-1604.

In like manner, on April 15, 2004 a separate timely Notice of Appeal was filed for case 00-1970 RLA [Docket-No. 176], which was designated as Appeal 04-1635 by the Court of Appeals.

16. At the same time, it was noted that the cases in Appeals 04-1604 and 04-1635 were separate and distinct

involving different parties; different actions; different issues; all of which occurred in different time periods – and consequently, different remedies were involved. Appeal 04-1604 [case 03-1287 RLA] encompassed a reduced set of issues; and was deemed to be more urgent since this case involved the reactivation of project construction. Consequently, it was requested that matters be simplified and expedited by considering Appeal 04-1604 first (new incarnation of the Improper Drainage etc.); and holding Appeal 04-1635 in abeyance. Unfortunately, the Court of Appeals for the First Circuit insisted that both Appeals be addressed concurrently in the same brief.

17. The contradictions exhibited by the state agency in evading the Improper Drainage issues in the initial case [00-1970 RLA] were only confirmed and exacerbated by PRHTA's Appellee Brief. This Plaintiff (November 1, 2004) strongly denounced PRHTA's allegations as evincing the lack of a proper drainage study; and as evincing the arbitrary nature of the Improper Drainage which was in violation of P.R. Laws Annotated Title 12 §701 –and which therefore was unacceptable; unnecessary, and unreasonable. Furthermore, PRHTA's allegations evinced the intent to conceal an adverse environmental impact.

Despite this overwhelming evidence; as well as the many issues contained in the record after four (4) years of litigation; the Court of Appeals did not allow oral argument as requested.

18. Furthermore, the contradictions and vindictive action by PRHTA have given rise to yet additional litigation [case 04-2324 JAF] that is beyond the scope of this petition; but which only confirms PRHTA's Over-arching Policy of Callous Indifference to Citizens' Civil Rights.

19. On May 6, 2005 the Court of Appeals for the First Circuit submitted an unpublished two (2) paragraph and one-sentence decision regarding both cases 00-1970

RLA and 03-1287 RLA; and affirming the District Court's decision in each instance.

After five (5) years of litigation, neither the District Court nor the Court of Appeals has fully addressed the Castro family's initial claims of a Pre-Deprivation Due Process Violation and the Improper Drainage. Nor have the lower courts granted the hearings requested by the Castro family; nor have they supported the requests for Discovery or availed themselves of the evidence at hand.

REASONS FOR GRANTING THE PETITION

1. The Castro family requests no favors; but only to exercise their right to have their day in court in a trial by jury. This right is guaranteed to all American citizens regardless of origin or location.

2. The right to obtain redress from the courts is well established in the Seventh Amendment to the Constitution of the United States of America, which guarantees a trial by jury in civil cases. Indeed, since the very beginning –and throughout the nation's history– this COURT has repeatedly noted that this fundamental right is inextricably entwined with other provisions of the U.S. Constitution and the notion of liberty itself:

> *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, (1803):
>
> "The very *essence of civil liberty* certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."
>
> *Chambers v. Baltimore & O.,* 207 U.S. 142, (1907):
>
> "The Right to sue and defend *in the courts* is the alternative to force. In an organized society it is *the Right conservative of all other rights* and lies at the foundation of orderly government."

> *Bracy v. Gramley*, 520 U.S. 899 (1997) (describing Judicial Due Process even for a convicted felon): "[...] the floor established by the Due Process Clause clearly requires a "*fair trial* in a *fair tribunal*," before a judge with *no actual bias* against the defendant *or interest in the outcome* of his particular case."

Furthermore, the courts are compelled to defend this right to trial by the mandate of the Federal Rules of Civil Procedure; all of which "shall be administered and construed to secure the just, speedy, and inexpensive determination of every action" (FRCivP Rule 1).

3. The aphorism that "power corrupts and absolute power corrupts absolutely" is sadly still very much applicable to human affairs. Indeed, in many nations the ability to enforce the law and protect the average citizen is all but inexistent.

The United States of America stands as a symbol of democracy throughout the world. The nation is not immune from human frailty; but has struggled to overcome such limitations. In this regard, this COURT has played an important part in ensuring that the rights set forth in the U.S. Constitution are available to *all citizens* –particularly in regard to Due Process and the Equal Protection of the Law.

Thus, this COURT has established that "No man in this country is so high that he is above the law" (*U.S. v. Lee*, 106 U.S. 196 (1882)). Further, this COURT recognized that in order to protect citizens' rights, 42 USC §1983 set forth the mandate to "[...] *interpose* the federal courts between the States and the people, as *guardians* of the people's federal rights [...]". (*Mitchum v. Foster*, 407 U.S. 225) Moreover, this COURT established that the guarantee of the Equal Protection of the Law extends beyond particular groups to encompass each citizen, which individually could be considered as a "class of one". Indeed, in *Willowbrook v. Olech* this COURT rejected the notion that the denial of water to an elderly couple was

merely a minor incident in a small Midwestern community. All to the contrary, the Olech family had a constitutional right to the Equal Protection of the Law that allowed for water service in their locality; and this right could not be wantonly infringed by public officials – particularly if these officials were acting in an "arbitrary and wholly irrational" manner. The fact that water service is of such fundamental necessity; and that the Olechs were an elderly couple; only serves to aggravate the unconstitutional nature of that situation.

4. Further, though the matters at hand are simple and straightforward –this does not diminish their importance. To the contrary, when fundamental rights are infringed there must be heightened concern of a threat to basic notions of fairness and the foundations of society itself.

Consequently, this COURT has acted under the principle that the freedom and general welfare of the nation rests upon the rights and prosperity guaranteed to its individual citizens; and that it is by this means that we achieve the constitutional goal of securing "the Blessings of Liberty to ourselves and our Posterity".

5. In turn, it is well established that the courts are compelled to act upon a showing of only but the proverbial "scintilla" of evidence. In the matters at hand, the Castro family has by far exceeded this requirement. More importantly, despite the impediment to Discovery generated by PRHTA and other Codefendants, the ensuing five (5) years of litigation at the federal courts have yielded overwhelming evidence in favor of the Castro family's position –and such evidence is readily available *in the very record* at the federal court itself.

6. Furthermore, in the situation at hand there is the inherent contradiction of the failure of powerful government agencies to simply answer the complaints. Indeed, the government agencies enjoy vast resources that allow them to readily address the issues set forth by the Castro family; and in fact these agencies were

required to have previously studied these issues as part of their design and administrative processes. The government agencies did not have to "defend" anything; but merely to justify their actions in the matters at bar – something which presumably should be readily available given over thirty (30) years of planning and the expenditure of untold Millions of dollars in consulting and engineering fees.

In contrast, the defendants have now been embarked upon five (5) years of litigation without answering any of the complaints. Furthermore, throughout the litigation the defendants have essentially evaded the issues set forth in all the Castro family's pleadings; such that these issues remain *unaddressed, unrefuted,* and therefore *unopposed.*

Indeed, it is now manifest that that the defendants have not answered because no answer is possible: they cannot justify the unjustifiable nor excuse the inexcusable. Instead, they have resorted to evading the issues altogether. Moreover, the government agencies' attempts to evade the scrutiny of the federal court, and the *contradictory* nature of their pleadings, have laid waste to their allegations and only call for a Judgment by DEFAULT against their position and in favor of the Castro family.

The detrimental consequences of the government's actions cannot be overstated: on the one hand, at risk are the many Millions of dollars of local and federal funds that are entrusted to these agencies; on the other hand, there are actions by the government that are "arbitrary and wholly irrational" –and thereby prejudicial to citizens' rights.

7. It is well recognized that FRCivP Rule 12(b) allows for dispositive motions by defendants seeking to have the complaint dismissed. However, it is equally clear that that dismissal is to be treated as an exception; and that a plaintiff's right to trial by jury cannot be

extinguished lightly. Indeed, the District Court has professed to safeguard the Castro family's rights.

In case 03-1287 RLA Docket-No. 48 (App- 7) the District Court alleges to adhere to the "Rule 12 Standard"; and after much string citation the District Court proclaims that (our emphasis):

a. "the court will accept all factual allegations *as true*"

b. "will make all reasonable inferences *in plaintiff's favor*"

c. "Our scope of review under this provision is a *narrow one. Dismissal will only be granted if* after having taken all well-pleaded allegations in the complaint as true, the Court finds that plaintiff is *not entitled* to *relief under any theory*."

d. "Further, our role is to *examine the complaint* to determine whether plaintiff has adduced sufficient facts to state a *cognizable cause of action*."

e. The complaint will be *dismissed if* the court finds that under the *facts as pleaded* plaintiff may *not prevail* on *any possible theory*.

Similarly, in case 00-1970 RLA Docket-Nos. 146, 174 (App- 35, 23)the District Court also promises to accept the facts alleged in the Complaint as true; and to make all reasonable inferences in favor of the plaintiffs.

Consequently, in light of the overwhelming evidence on record; and of the defendants' inability to respond or address the issues; the Complaints remain essentially unchallenged –and therefore must be accepted as true, thereby allowing the cases to proceed to trial. Unfortunately, this was not to be.

8. The District Court did not hold true to its commitment to the "Rule 12 Standard" and to the facts at hand. Instead, that court succumbed to the defendants' allegations and has strayed far afield –resulting in

practically the complete deprivation of plaintiff rights. This unfortunate state of affairs arises from:

a. The misapplication or non-application of the doctrine set forth by this COURT.

b. Having misapplied the doctrine, the propensity to embrace any state allegations that comport with this misapplied view –regardless of fact that the allegations are contrived, distorted, or have been otherwise "shoehorned" into presenting a false picture of the situation.

c. As a matter of law, the complete disregard of the plaintiffs' specific indications that the doctrine should not be misapplied; and the failure to address –much less refute– the plaintiffs' pleadings outlining specific deficiencies and gross distortions of fact.

d. More importantly, the complete disregard and outright suppression of the plaintiffs' claims that do not subscribe to the misapplied doctrine –and in fact never had anything to do with the misapplied contentions in the first place. Moreover, the disregard of the overwhelming evidence available before the very eyes of the lower courts in the very record of the cases.

Thus, any semblance of Judicial Due Process (*Bracy v. Gramley*) has been denied: there is *no fair trial* because there is no trial at all; there is *no fair tribunal* because judicial doctrine has been misapplied and the plaintiffs' claims have not even been considered; and a pernicious form of *bias* has been introduced whereby no matter what the plaintiffs claim, the state will escape responsibility by invoking misapplied doctrine and simply fabricating their own scenario. In denying "the right that is conservative of all others" (*Chambers*) the lower courts have in effect completely denied the plaintiffs the right to defend themselves from transgressions from the state.

9. The Castro family has repeatedly stated that the situation at hand should have never happened. Matters are straightforward, and involve the plaintiffs' undisputed property rights. The state had only but to heed the very laws, regulations, professional standards, and even basic notions of fairness that were intended to protect the plaintiffs in the first place.

Instead, PRHTA disregarded these standards by misapplying the doctrine of *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985); with the full expectation that it could evade the issues with impunity – simply by arbitrarily confining all to purported matters of compensation. In effect, PRHTA places itself above the law; and an improper *immunity* is presumed in which PRHTA purports to rampage throughout the adjacent properties and disregard all the provisions of law and the U.S. Constitution save matters of compensation. This situation is manifest and documented in the record with Improper Drainage; Environmental Impact Statements rejected by the courts; Improper Surveys, Improper Appraisals; Improper documents submitted to the courts; etc. It is not just the Castro family that has been afected, but the population as a whole; and situation has deteriorated into a systemic violation in which PRHTA openly pursues an Over-arching Policy of Callous Indifference to Citizens' Civil Rights –to say nothing of the corruption of professional standards.

10. This COURT has established that, in civil rights cases under 42 USC §1983, there is *no* requirement to exhaust state *judicial* remedies (*Monroe v. Pape*, 365 U.S. 174; *Zinermon*), and *no* requirement to exhaust state *administrative* remedies (*Patsy*) before seeking the protection of the federal courts. In *Williamson* an *exception* to this no exhaustion rule was created due to the "special nature of the Just Compensation Clause of the Fifth Amendment". *Williamson* involved a regulatory taking; and the doctrine set forth established that, under these circumstances, claims for monetary compensation

for regulations that have gone too far are required to exhaust state remedies before addressing the federal forum. This doctrine was later extended to also encompass monetary compensation for physical takings.

However, this COURT clearly established that it did not intend to dismantle the civil rights movement and its relevant jurisprudence. Rather, *Williamson* (at note 14) was confined to monetary claims under the Just Compensation Clause; and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) was specifically distinguished along with other matters of Due Process and the Equal Protection of the Law.

11. Unfortunately, in the intervening years states have repeatedly attempted to evade the federal courts by misapplying the *exception* doctrine set forth in *Williamson*. In *Sinaloa Lake Owners v. City of Simi Valley*, 882 F.2d 1398, a dam was destroyed thereby eliminating an entire lake. The court found that the municipality could not evade federal jurisdiction since taking issues under the Just Compensation Clause were separate and distinct from claims of Due Process for the wanton destruction of the dam in the first place –even though both claims arose from the *same set of facts*:

> "Two or more legal theories may cover the same conduct and a plaintiff is *entitled to prove each claim* according to its terms." (our emphasis)

In *Deepwells Estates v. Incorporated Village*, 973 F. Supp. 338, a developer's regulatory taking claim and requests for monetary compensation fell well within the *Williamson* doctrine. However the state could not escape federal jurisdiction for other separate and distinct claims that, once again, arose from the same set of facts. Indeed, the court found that: (our emphasis)

a. There was an "*over arching policy*" of the village to extort concessions from the developer; and that "the *continuing violations theory* is applicable".

b. Deprivation of property rights was "pursuant to Village *policy*"; thus the court allowed the developers "claims for procedural due process."

c. The court allowed claims for the "deprivation of substantive due process" since the village acted "in an *arbitrary and irrational* manner in depriving them of their property interest."

Kruse v Village Of Chagrin Falls, 74 F.3d 694 addressed a particularly poignant issue involving the unannounced invasion and destruction of a portion of the Kruse family's home –and exacerbated by the village's delays and reticence to pay for the damage. The monetary compensation claims for the physical taking clearly fell within the *Williamson* doctrine; but yet again the state could not be allowed to escape federal jurisdiction. Here the issue was entirely based on monetary compensation; but even so the state had acted illegally; and after ten years the village was still reluctant to pay the Kruse family. Even within the *very same claim* for monetary compensation, a Due Process issue arose that required prompt payment. *Williamson* was set aside, and the court allowed the monetary compensation issue to proceed to the federal forum.

Further, in *Logan* –a case specifically distinguished in *Williamson*– this COURT found a systemic violation in which the same facts supported claims of a deprivation of both Due Process and the Equal Protection of the Law. Indeed, the concept of multiple constitutional issues arising from the same facts has been repeatedly noted by this COURT; e.g. *Soldal v. Cook County*, 506 U.S. 56:

> "*Graham v. Connor*, 490 U.S. 386, does not require a court, when it finds that a wrong implicates more than one constitutional command, to look at the dominant character of the challenged conduct to determine under which constitutional standard it

should be evaluated. Rather, each constitutional provision is examined in turn."

12. PRHTA's misapplication of *Williamson* has pervaded the litigation in the courts below which have unfortunately embraced this fallacy. As stated previously, it is not merely the misapplication of this doctrine; it is the *manner* in which it has been misapplied –and the detrimental consequences for the interests of justice. A glance at the relevant opinion of the Court of Appeals for the First Circuit (App- 4) immediately reveals the nature of the situation; indeed, the lack of substance in the scanty two paragraphs speaks volumes.

13. To begin, the very first sentence is inaccurate; and the enclosed table (App- 46) illustrates that the District Court has not reviewed matters on the merits as in FRCivP Rule 12(b)(6) –failure to state a claim. Rather, the cases have been dismissed on questions of jurisdiction. In fact, the very next sentence speaks of "ripeness"; which does not address the merits but presents a question of subject matter jurisdiction instead.

14. The Court of Appeals joins with the District Court and misapplies *Williamson* in order to dismiss a purported "just compensation claim" –however, throughout five (5) years of litigation the Castro family has repeatedly protested that no such claim exists. Nowhere in the 78 pages of the complaint in case 00-1970 RLA is there any claim for any monetary compensation for any property taken. Nowhere have the defendants or the courts below been able to substantiate any such claim or any such monetary amount; nor is there any such claim in the subsequent case 03-1287 RLA.

15. The attempt to arbitrarily confine matters to non-existent claims of monetary "just compensation" is all the more egregious in light of the fact that the Prefatory at the beginning of the complaint [case 00-1970 RLA] states that there is no such claim; and the Castro family has repeatedly protested the unsubstantiated misapplication of *Williamson*. Furthermore, for 2½ years

the District Court recognized the Castro family's claims as regarding a Pre-Deprivation Due Process Violation and an Improper Drainage. Even the Order [Docket-No. 146, page 2] recognizes this classification of plaintiff claims.

However, in the very next page of the aforementioned Order, and in a sudden act of *non sequitur*, the Castro family's claims are *suppressed* and somehow transmuted into "expropriation-related" claims, which somehow involve a "taking" and "substantive due process" violation. Nowhere have the lower courts provided any justification for such suppression and transmutation; which can only be seen as succumbing to a preconceived notion that the plaintiffs must somehow be confined to matters of "just compensation" –which the state can then evade by misapplying *Williamson*.

16. Unable to provide any substance to any purported allegation of "just compensation"; the defendants attempted to misrepresent that attorneys' fees can somehow lend support for such allegation. The District Court succumbed to this incongruous proposition; and unfortunately the Court of Appeals has followed suit. The level of obfuscation on this matter lays bare the gross distortion that can be produced by a penchant to misapply *Williamson* and declare everything "expropriation-related". Indeed, having succumbed to the defendants; the contentions of the lower courts cannot withstand the slightest scrutiny.

To begin, the Court of Appeals fails to differentiate attorneys' fees that would accrue under 42 USC §1988 for an action under 42 USC §1983; or those that accrue for unreasonable and vexatious litigation under 28 USC §1927; from the attorneys' fees requested as a *remedy* for a Pre-Deprivation Due Process Violation [case 00-1970 RLA]. Further, it is clear that attorneys' fees are quite simply for the attorneys; and if granted cannot be considered "just compensation" for the plaintiffs –if not granted, obviously they are inexistent. Either way, the lower courts fail to realize that their objections to

attorneys' fees simply confirm that there is no monetary amount that can justify the application of the *Williamson* doctrine in the first place. Indeed, in the matter of attorneys' fees, the Court of Appeals has entered into a circular argument that only succeeds in further demolishing its own contentions.

But the Court of Appeals strays even farther afield. The American Rule is *inapplicable* to the cases at hand [case 00-1970 RLA; case 03-1287 RLA] in light of 42 USC §1983 and 42 USC §1988. Furthermore, the lower court's citation of *Fleischmann v. Maier*, 386 U.S. 714 (1967) lends no support: this case concerns trademark infringement and the Lanham Act (60 Stat. 427, 15 U.S.C. 1051-1127) –which is completely inapposite to the matters at hand.

17. What is more, the lower courts have failed to appreciate the obvious: the matter of attorneys' fees has effectively been moot and inexistent for years. This Plaintiff and the Castro family have been acting *pro se* since late 2002. All the lower courts' decisions; and the entire appellate process have been conducted on a *pro se* basis. Even the state cases in large part have been conducted on a *pro se* basis. Consequently, it is hardly possible that inexistent attorneys' fees can be used as a basis for dismissal of the cases at hand.

18. In yet another effort to force matters into the *Williamson* mold, the Court of Appeals not only has misstated the Castro family's position; it has acted in contravention of this COURT's indications in *Logan*. Contrary to the Court of Appeals assertions, case 00-1970 RLA has not presented any controversy over the adequacy of "state procedures for obtaining just compensation" – which is clearly but a post-deprivation remedy. Instead, the Castro family stated that, as in *Logan*, they had been denied the pre-deprivation protection that would have eliminated the need to seek any "just compensation" in the first place.

Where the Court of Appeals says that it cannot find any authority; *Logan*, in contrast, has established that, for a systemic violation of citizen's rights, confining matters to a post-deprivation "independent tort action" would be "constitutionally inadequate" –i.e. the state cannot deny procedures that provide predeprivation protection, only to then confine redress to post-deprivation "just compensation" procedures.

19. Consequently, the misapplication of the *Williamson* doctrine has set the stage for the complete deprivation of the Castro family's rights. Having categorized matters under the *Williamson* banner; the cases have been improperly marked for dismissal, and an "avalanche" effect is set in motion whereby all claims of any type are simply pushed aside or otherwise manipulated in order to effect such dismissal.

20. Thus, while the Court of Appeals proffers that it has listed "reasons" for affirming the District Court's judgment; a glance at the opinion reveals that there is no factual support for the contentions proffered –or even any relation to the claims set forth in the complaints. While the Court of Appeals advances that a "thorough review" has been performed; the two scanty paragraphs proffered do not evince any such review.

21. Indeed, as a matter of law the Court of Appeals was called upon to perform a *de novo* review; but instead has submitted an unpublished opinion that merely mimics some of the conclusions of the District Court. There is a stark contrast between the extensive efforts rendered by the plaintiffs in the Appellant's Briefs, and the sparse comments in the Court of Appeals' opinion – which does not state any commitment to *de novo* review; and does not even mention the major claims and the statement of the issues set forth by the Castro family. In fact, even the title sheet is rendered grossly inaccurate by not mentioning defendants Río Construction, Greiner Caribe, Sergio González, Angel Rivera Salas, and Walter Rivera.

22. Furthermore, it is particularly troubling to observe that the opinion of the Court of Appeals does address the cases themselves; nor the fact that Appeal 04-1604 and Appeal 04-1635 are separate and distinct –and therefore that the lower court had been advised that consolidation was not possible and indeed prejudicial. As a matter of law, the Court of Appeals did not address the issue of inapposite consolidation; but has nevertheless obfuscated matters by presenting an opinion as if there were only one case.

23. Moreover, as stated in *Bright v Westmoreland County*, Case 03-4320, Court of Appeals 3rd Cir. (2004) (criticizing a judge for lack of independent review and plagiarizing the defendants' pleadings):

> "Judicial opinions are the core work-product of judges. [...] They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic."

Consequently, the scanty nature of the Court of Appeals' opinion; and the absence of a proper *de novo* review; are departures that by themselves are sufficient to call for the supervisory powers of this COURT.

24. Next to be pushed aside by the lower courts, is the fundamental right to the Equal Protection of the Law. Despite the similarities noted with the situation in *Willowbrook v. Olech*, the lower courts refused to apply this doctrine; and in fact have utterly suppressed any mention of this issue.

25. This matter is further compounded by the lower courts suppression of the Castro family's claim that they have been subjected to a continuing systemic violation, i.e. PRHTA and the Codefendants' Over-arching Policy of Callous Indifference to Citizens' Civil Rights. Not only does this suppress the repetitive violation of multiple statutes and regulations; it attempts to suppress the doctrine set forth in *Logan* as well.

26. In fact, *Logan* provides several unifying concepts that are particularly appropriate to the situation at hand; some of which have been noted *supra*. Recall that this case was specifically distinguished in *Williamson*; and that post-deprivation tort action cannot remedy the systemic deprivation of property rights. Now, we note that in *Logan* the pernicious and systemic nature of the deprivation were such that a majority of this COURT (in different opinions) found that the *same set of facts* gave rise to the deprivation of *both* Due Process (main opinion) and the Equal Protection of the Law (separate opinions).

Lavergne Logan complained of employment discrimination due to a physical limitation. The law allowed him a right to a hearing on this matter; but through bureaucratic bungling he was denied this right. It would have been a simple matter for the state to have corrected this situation, but it *refused* to do so. Thus, the deprivation arose not from mere error; but from by a state policy of indifference for citizen's rights, such that the state regularly refused to correct such improprieties. This was compounded by the lack of procedural safeguards against such a systemic deprivation; and further exacerbated by the lower court's endorsement of such refusal to correct known deficiencies. Therefore, the systemic violation went far beyond Mr. Logan, to encompass other citizens as well. Moreover, the state's refusal to correct its own improprieties stands in contradiction to good faith and basic notions of fairness.

27. This COURT found that Mr. Logan had a property interest in the relevant hearing; and that the state had deprived him of such property interest without Due Process. From the point of view of the Equal Protection of the Law, the results are more scathing: the state had created an entire class of citizens who were victims of bureaucratic deficiency; these citizens would then suffer the additional indignity of the deprivation of the very provisions of the law intended to protect them. As stated by Justice Blackmun: "rationality is absent

here"; and the state had run afoul of the "lowest [most basic] level of permissible equal protection scrutiny".

28. The situation at hand encompasses the criteria set forth in *Logan* –indeed, matters have been only but exacerbated. The Castro family is not an applicant for any permit or license; nor is otherwise a petitioner to any state agency for any privilege or approval. Instead, the Castro family is the owner of physical property that has been subject to improper action by the defendants. Therefore, the Castro family has asserted its protected right to the enjoyment of its own property; and has asserted all the property interests which accrue from this fundamental property right –which are perhaps the *quintessential* property interests. In particular, the right to the very laws, regulations, professional standards, and even basic notions of fairness that were intended to protect the plaintiffs in the first place.

29. Further, the Castro family is not the victim of mere error by the state –if that were so, the situation would have been corrected long ago. Instead, the Castro family has been subjected to an Over-arching Policy of Callous Indifference to Citizens' Civil Rights; in which the state not only refuses to correct its improprieties; but apparently never intended to comply with the law in the first place. Moreover, the scope this policy of callous indifference is far reaching; and the population as a whole is affected by the state agencies brazen attempt to place themselves "above the law".

Indeed, the record notes the failure of the defendants and the lower courts to address –much less justify– the multiple violations of the law and of the relevant regulations. Further, they have been unable to demonstrate any "rational relationship with any legitimate state interest". Once again, the deprivation of the Equal Protection of the Law is confirmed, since in the words of *Logan*: "rationality is absent here".

30. Having evaded matters of the Equal Protection of the Law, the Court of Appeals embarks upon an

attempt to address the question of Due Process. Here, it is immediately apparent that situation has gone beyond the *misapplication* of the relevant doctrine for Due Process; instead, the doctrine set forth by this COURT in *Zinermon v. Burch*, 494 U.S. 113, 126 (1990) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) has essentially *not been applied at all.*

31. A careful reading of the Court of Appeals' opinion reveals that once again the issues and the merits of the case have *not been addressed at all.* Instead, the lower courts have retreated 23 years into the past; and have relied entirely on pre-conceived notions:

> "Our cases make clear that a regulatory board does not transgress constitutional due process requirements merely by making decisions "for erroneous reasons" or by making "demands which arguably exceed its authority under the relevant state statutes."" *Amsden v. Moran,* 904 F.2d 748, 754 (1st Cir.1990) (quoting *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 n. 9 (1st Cir. 1982))

To begin, the Court of Appeals was forewarned that the cases cited were but string citation (based on *Creative Environments*); and are completely inapposite to the matters at hand. *Amsden* involved a surveyor's license; *Creative Environments* and *Nestor Colon Medina & Sucesores, Inc. v. Custodio,* 964 F.2d 32, 39 (1st Cir.1992) involved a planning board approval; and *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991) involved a building permit.

32. Furthermore, the First Circuit has effectively attempted to create yet another form of immunity; in which matters regarding "regulatory boards" will be declared "merely erroneous" such that a deprivation of constitutional rights will never be found –and all of this is achieved by mere analogy and without reference to the merits of the case.

33. Moreover, once again the Court of Appeals proposes to confine matters to its preconceived notions; and simply suppress any claim or fact that could challenge their views. Indeed, matters are further confined to the Environmental Quality Board (EQB); presumably in case 03-1287 RLA; and in disregard of all other defendants and issues.

These contentions cannot withstand the slightest scrutiny.

34. As a matter of law, the characterization of the EQB as a "regulatory board" is inaccurate. But the assertion by the Court of Appeals that the EQB "developed the Environmental Impact Statement in question" reflects a gross misunderstanding of the entire environmental process. What is more, the Court of Appeals has suppressed the fact that, in case 03-1287 RLA, the responsibility for the development, content, and accuracy of the Environmental Impact Statement rests with PRHTA, Codefendant Fernando Fagundo, and Codefendant Barrett & Hale –which clearly are the proponents of the project. Indeed, this is an important issue in that complaint; and it has been noted that misrepresentation or concealment in this regard would make these defendants liable for a misdemeanor under PR Laws T12 §1136(e) . To compound matters, this is also a central issue in *Colón-Cortés v. Pesquera*, which we will briefly address in subsequent paragraphs. Therefore, the misunderstanding by the Court of Appeals of the fundamental aspects of environmental law –which share great commonality with federal Environmental Protection Agency standards– is of major concern; and this departure alone calls for the supervisory powers of this COURT.

35. Consequently, the Court of Appeals preconceived notions are immediately demolished. The Environmental Imnpact Statement process is not a "regulatory board" that hands out licenses or permits; nor is the Castro family an applicant for any such permits.

Further, in light of the defendants's participation in an "Over-arching Policy of Callous Indifference to Citizens' Civil Rights", the defendants' actions have gone far, far, beyond the level of "merely erroneous" (*Logan*). Indeed, in regard to the Environmental Impact Statement, it is difficult to conceive of a more complete and utter deficiency than the failure to report Adverse Environmental Impacts such as the Improper Drainage. Also, far from "conceding" anything, the Castro family has noted that the environmental process did not offer an opportunity "granted at a meaningful time and in a meaningful manner" "for a hearing appropriate to the nature of the case" (*Logan*). Moreover, the Court of Appeals' contentions are completely devoid of any substantial reference to the issues at hand.

36. But there is more. In an attempt to impose its preconceived notions, the Court of Appeals has misapplied and/or evaded the doctrine of Due Process as summarized in *Zinermon*. Thus, the Court of Appeals launches its own approach to Procedural and Substantive Due Process. Procedural Due Process is *now to be confined* only to an evaluation of "constitutional adequacy"; which is not defined, but appears to be limited to the law or regulation as written –or as established in theory. The Court of Appeals then proposes to manipulate and confine *all* claims for arbitrary action; or the violation of the law; to the rubric of Substantive Due Process. Having completely departed from the doctrine in *Zinermon*, the Court of Appeals compounds matters by citing this case, and purporting to adhere to its indications.

37. *Zinermon* involved matters of Procedural Due Process, which was defined therein as "a guarantee of fair procedure". "Fair procedure" certainly involves a consideration of the inherent fairness of the procedure as written or as applied in theory; but in civil rights actions under 42 USC §1983 the question goes beyond theory. *Zinermon* itself states: "in many cases there is 'no quarrel with the state laws on the books'; instead, the problem is

the way those laws *are or are not implemented* by state officials" (quoting *Monroe v. Pape*). (our emphasis) Thus, *Zinermon* outlines fundamental elements of Procedural Due Process: the nature of the property interests at hand; whether predeprivation process was feasible; the foreseeabilty of the actions protested; whether the actions were intentional or unintentional, or random and unauthorized; and the concomitant duty of the state officials to provide safeguards. Matters are not confined to vague notions of "erroneous actions"; rather, in the matters at hand the actions were not random, but intentional, fully authorized, and part of a policy that effects the systemic deprivation of the predeprivation protection guaranteed in the law itself. These criteria, along with the record, only but confirm that the Castro family has been deprived of Procedural Due Process; and that the state officials were derelict in the performance of their duty –and therefore bear full responsibility for such deprivation.

38. Further, the Court of Appeals proclaims that the matter of Substantive Due Process is out of reach by invoking *Nestor Colon v. Custodio* and "high thresholds". But to the contrary, that very same case points out that the standard for Substantive Due Process includes gross deprivations that are oppressive and/or "legally irrational in that [they are] not sufficiently keyed to any legitimate state interests". It has already been noted that neither the defendants nor the lower courts have been able to refute the fact that "rationality is absent" in their contentions.

39. In yet another act of suppression, the Court of Appeals has disregarded the jurisprudence and *res judicata* set forth in *Colón-Cortés v. Pesquera* (2000). On the one hand, the lower courts have failed consider the fundamental predeprivation protection afforded by an Environmental Impact Statement and guaranteed by environmental law. On the other hand, the lower courts have also failed to appreciate the abysmal failure of the

state agencies to produce a proper Environmental Impact Statement despite over 30 years "planning". These matters are not "merely erroneous action"; *Colón-Cortés v. Pesquera* only but confirmed PRHTA's Over-arching Policy of Callous Indifference to Citizens' Civil Rights – indeed, PRHTA attempted to go beyond the law and defy the orders of the Supreme Court of Puerto Rico. Further, *Colón-Cortés v. Pesquera* established that PRHTA and the EQB had in essence colluded in allowing a deficient Environmental Impact Statement. Thus, the local supreme court set forth specific standards for the EQB, including: the responsibility to ensure compliance with environmental law; and ensure that a rigorous analysis has been performed of the consequences, such that public is fully informed.

40. Consequently, the lower courts have not considered the stark contradiction to *Colón-Cortés v. Pesquera* in the defendants' failure to produce a proper drainage study; the refusal to correct an illegal drainage (PR Laws T12 §701); and the failure to report adverse environmental impacts.

41. Therefore, what the lower courts have allowed is not merely the unjustified dismissal of the cases at hand; but a new doctrine that embodies the systematic denial of the Castro family's property rights; the denial of the protection of environmental law; and the near complete deprivation of even the very notion of Due Process and the Equal Protection of the Law –*in general and under all circumstances; and for the entire population.*

42. The Castro family had already complained of retaliation and of years of wanton litigation; now the situation has also deteriorated into the deprivation of the right to trial under the Seventh Amendment; and a state government effort to deprive us of the right to freedom of speech and to seek redress under the First Amendment.

43. However, in seeking to correct these deprivations, this Court need not necessarily revisit in

detail the multiple issues involved –since the record reveals that the lower courts have not addressed the claims; and in reality, the cases have not been dismissed at all. The initial claims in case 00-1970 RLA of the Pre-Deprivation Due Process Violation and the Improper Drainage have yet to even be addressed; and the situation is similar in case 03-1287 RLA. Further, there is simply no basis for the Court of Appeals attempt to present both cases as a single matter.

44. The Castro family's right to trial cannot be extinguished on this basis. The lower courts' contentions are facially deficient; do not address the issues; and are not substantiated by the facts. What is required is that the Castro family be allowed a *full and fair opportunity* to litigate its claims –as set forth by itself in the Complaints; and without external obfuscation and manipulation. That is, the right to have its day in court –which should not have been delayed/denied in the first place. We have been able to endure thus far only as pro se litigants; and only at great personal cost.

Conclusion

Consequently, we respectfully beseech this COURT to reverse the decisions of the lower courts; and allow the restraining orders and discovery requested such that these matters may be resolved expeditiously; on the merits; and at trial. Despite the protracted nature of the situation, the record itself presents a volume of evidence that points toward a prompt resolution at trial.

Respectfully submitted,

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R. E Castro

August 3, 2005

APPENDIX

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Statement:

WE hereby establish that, in addition to asserting our Civil Rights and protected property interests under the U.S. Constitution, we embody the pending claims and act in substitution of our deceased father Mr. Ezequiel Castro. Further, we establish that our mother (Aurora Adames) is currently 87 years old and of frail health; and that as the only son residing in Puerto Rico, Ramon Castro is managing her affairs and acting as her guardian *ad litem*. The Castro family has acted as a single united entity; who shares the same protected property interests and property rights; who have jointly manifested the same claims through the voice and actions of Ramon Castro; and who now jointly present their united claims in the petition before this COURT. A recent illness has rendered Aurora Adames unable to sign any document; however, we assert her acquiescence in the defense of her rights.

By: **Aurora Adames** -- Pro Se

By: Ramon E Castro

Ramon E Castro -- Pro Se

By:

Ida L. Castro --Pro Se

Date: 03/AUGUST/2005

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United States Court of Appeals For the First Circuit

No. 04-1604

EZEQUIEL CASTRO-RIVERA, ET AL., Plaintiffs, Appellants,

v.

FERNANDO FAGUNDO, ET AL., Defendants, Appellees.

No. 04-1635

AURORA ADAMES, ET AL., Plaintiffs, Appellants,

v.

PUERTO RICO HIGHWAY AND TRANSPORTATION AUTHORITY, ET AL., Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Raymond L. Acosta, Senior U.S. District Judge]

Before
Boudin, Chief Judge, Lipez and Howard, Circuit Judges.

Ramon E. Castro, Ida L. Castro and Aurora Adames on brief pro se

Raul Castellanos-Malave and E. Umpierre Suarez. C. S . P. on brief for appellee Puerto Rico Highway and Transportation Authority.
Juan J. Villella-Janeiro on brief for appellee Barrett & Hale.
Francisco Rios-Rivera and Llovet Zurinaga & Lopez. P.S.C. on brief for appellee Esteban Mujica.

May 6, 2005

Per Curiam.

After a thorough review of the record and of the parties' lengthy submissions, we affirm the district court's dismissal of the federal claims in these cases pursuant to Fed. R. Civ. P. 12 (b) (6). The just compensation claim was not ripe at the time it was dismissed. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985). Appellants suggest that the state procedures for obtaining just compensation are inadequate because they do not provide for recovery of attorney's fees; but there is no authority for this suggestion. The American Rule is well-established, and it provides that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

The district court also was correct to dismiss the procedural and substantive due process claims. Appellants seem to concede that they were afforded notice and an opportunity to be heard by the Environmental Quality Board that developed the Environmental Impact Statement in question. But, where a plaintiff claims his procedural due process rights were violated, the federal court's only concern should be whether the procedure afforded was constitutionally adequate; and the local procedures here suffice. The appellants' claim that government officials acted arbitrarily and/or in violation of state law and procedures is a substantive due process claim. See Zinermon v. Burch, 494 U.S. 113 (1990).

Not every incorrect decision by a state administrative body rises to the level of a due process violation. See PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 31 (1st Cir. 1991) ("Even where state officials have allegedly violated state law or administrative procedures, such violations do not

ordinarily rise to the level of a constitutional deprivation.") (citation omitted). "Our cases make clear that regulatory board does not transgress constitutional due process requirements merely by making decisions 'for erroneous reasons' or by making 'demands which arguably exceed its authority under the relevant state statutes.'" Amsted v . Moran, 904 F.2d 748, 757 (1st Cir. 1990) (quoting Creative Env'ts, Inc. v Estabrook, 680 F.2d 822, 832 n. 9 (1st Cir. 1982)). The court will allow substantive due process claims to proceed" in truly horrendous situations," Nestor Colon Medina & Succesores, -Inc. v. Custodio, 964 F.2d 32, 45 (1st Cu. 1992) ; but "the threshold for establishing the requisite 'abuse of government power' is a high one indeed." Id. That threshold has not been met here.

For all of these reasons, the judgment of the district court in these cases is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

EZEQUIEL CASTRO RIVERA, et al., Plaintiffs,

v.

FERNANDO FAGUNDO, et al., Defendants.

CIVIL NO. 03-1287 (RLA)

Order Dismissing The Complaint

The court is called upon at this time to examine the allegations in the complaint to determine whether or not jurisdiction has been properly asserted by plaintiffs.

PROCEDURAL BACKGROUND

This action was instituted by the owners[1] of a property located along the route of a state government highway project originally denominated Highway PR-66 and now designated as the Eastern Corridor. Plaintiffs challenge the design of the drainage discharge system for the project on due process grounds pursuant to 42 U.S.C. § 1983.[2]

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1 The property was originally owned by EZEQUIEL CASTRO RIVERA and his wife, AURORA ADAMES. Although MR. CASTRO RIVERA appears as a the sole named party in the caption he passed away on May 4, 2002, prior to the filing of the complaint. The pleading clarifies that decedent is substituted by his widow and their two children, RAMON and IDA CASTRO appearing *pro se*.

2 Plaintiffs instituted a previous suit entitled Ezequiel Castro Rivera v. Puerto Rico Highway and Transportation Authority, Civ. No. 00-1970 (RLA) alleging both constitutional and tortious claims against the PRHTA, various of its officials, as well as the contractor, plan designer and project manager of the highway. In those proceedings plaintiffs averred that the amounts offered as fair compensation in the pending eminent domain proceedings were inadequate. The court determined that it had no jurisdiction over

Named defendants are: FERNANDO FAGUNDO, Director of the PUERTO RICO HIGHWAY AND TRANSPORTATION AUTHORITY ("PRHTA") in his personal capacity,3 the PRHTA, ESTEBAN MUJICA, an officer of the local ENVIRONMENTAL QUALITY BOARD ("EQB") who signed the resolution approving PRHTA's Environmental Impact Statement ("EIS") also in his personal capacity, and BARRET & HALE, a private contracted project designer.

The highway, which is expected to run between the Municipalities of Canovanas and Carolina, seeks to alleviate the heavy traffic congestion generated by the tremendous growth of municipalities located to the West of the larger San Juan metropolitan area. The formal Environmental Impact Statement ("EIS") process commenced in 1992. However, plans for its construction were delayed due to controversies generated by environmental issues. On April 19, 2000, the Puerto Rico Supreme Court found the EIS process deficient and paralyzed construction. See Colón-Cortés v. Pesquera, 2000 WL 424713.

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these claims. *See* Order Dismissing Expropriation-Related Claims (docket No. 146). The § 1983 claims asserted against the private defendants were also dismissed for lack of the requisite "state action". *See* Order Dismissing Claims Asserted against Private Defendants (docket No. 149).

3 The respective spouses and conjugal partnerships of the individual defendants are also included as party defendants.

This suit attacks the adequacy of the process leading to the Environmental Impact Statement approved by the EQB subsequent to the Supreme Court's decision.

ADMINISTRATIVE PROCEEDINGS

The following summarizes plaintiffs' allegations regarding the administrative process leading to the final approved EIS.

Plaintiff RAMON CASTRO participated in the EIS public hearings held by the EQB on January 17, 2002, and raised the drainage problems posed by the project.

On April 17, 2002, codefendant MUJICA issued a resolution pointing to 22 specific deficiencies in the EIS proposed by PRHTA including specifically the failure to provide information regarding the stormwater drainage.

On July 23, 2002, RAMON CASTRO wrote to MR. MUJICA alleging the proposed EIS was contrary to law in that it failed to comply with the local environmental legal provisions and sought to avoid known adverse environmental impacts.

On August 13, 2002, the PRHTA submitted an "updated" version of its EIS which did not address the drainage issues.

Plaintiff RAMON CASTRO again wrote to MR. MUJICA outlining the alleged deficiencies in the PRHTA's proposal.

A public hearing was held on October 3, 2002, on the "updated" version of the EIS at which time RAMON CASTRO again submitted specific deficiencies regarding drainage and flooding which he

contended ran contrary to applicable environmental law and regulations.

On November 5, 2002, the EQB issued a resolution finding that PRHTA had "substantially satisfied" the agency's previous requirements but acknowledged that the PRHTA had failed to provide information on stormwater drainage for the project and instructed it to respond to the issues raised by MR. CASTRO.

On January 7, 2003, the PRHTA submitted a final EIS version in which codefendant BARRET & HALE acknowledges that the drainage is deficient. According to plaintiffs they were not served with a copy of this document.

On February 18, 2003, MR. MUJICA issued EQB Resolution R-03-5-1 approving PRHTA's final EIS. The resolution determined that the submissions by PRHTA and BARRET & HALE were adequate and satisfied EQB's previous requirements.

Plaintiffs allege that the procedure followed by the EQB was flawed because they were not informed of the changes proposed by PRHTA in its EIS version of January 1, 2003. Plaintiffs characterize the fact that they were not notified of the "secret" proposal as "disturbing" and ascribe to it ill motives on defendants' part. In pertinent part, the pleading charges as follows:

[T]he CHANGES to the Improper Drainage raise disturbing questions; not the least of which is the fact that they were submitted in secret. Thus the CHANGES were submitted

secretly; the improper EIS-F was submitted secretly; and Mr. Esteban Mujica secretly approved the Improper EIS-F. The Castro family was never informed, never consulted, and never received an answer as purported in EQB-Resolutions-1, 2. Instead, on February 20, 2003 the Castro family received a copy of the EQB Resolution R-03-5-1 (hereinafter EQB- Resolution-3) signed by Mr. Esteban Mujica and issued on February 18, 2003. EQB-Resolution-3 simply declares that the submittals by PRHTA and Codefendant Barret & Hale are 'adequate'; further declares that PRHTA has 'satisfied' EQB's requirements thus approving PRHTA's Improper EIS-F. Complaint ¶ 14 pp. 17-18 (caps and bold in original).

Additionally, plaintiffs argue the EIS is contrary to law because it does not adequately address the adverse effects of the water discharge as provided for in the pertinent statutes, regulations and manuals. According to plaintiffs, "PRHTA has yet to provide the information on stormwater drainage required in the EQB's own regulations. Moreover, plaintiffs' claim that PRHTA has yet to establish any justification for discharging stormwater from the proposed highway on to the Castro property." Complaint ¶ 15 p. 18.

RULE 12 STANDARD

In disposing of motions to dismiss pursuant to Rule 12(b)(6) Fed. R. Civ. P. the court will accept all factual allegations as true and will make all reasonable inferences in plaintiff's favor.

Frazier v. Fairhaven School Com., 276 F.3d 52, 56 (1st Cir. 2002); Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001); Berezin v. Regency Sav. Bank, 234 F.3d 68, 70 (1st Cir. 2000); Tompkins v. United Healthcare of New England, Inc., 203 F.3d 90, 92 (1st Cir. 2000) .

Our scope of review under this provision is a narrow one. Dismissal will only be granted if after having taken all well-pleaded allegations in the complaint as true, the Court finds that plaintiff is not entitled to relief under any theory. Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995) cert. den. 116 S.Ct. 1044 (1996); Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994). Further, our role is to examine the complaint to determine whether plaintiff has adduced sufficient facts to state a cognizable cause of action. Alternative Energy, 267 F.3d at 36. The complaint will be dismissed if the court finds that under the facts as pleaded plaintiff may not prevail on any possible theory. Berezin, 234 F.3d at 70; Tompkins, 203 F.3d at 93.

SECTION 1983

Section 1983 does not create substantive rights but is rather a procedural mechanism for enforcing constitutional or statutory rights. Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); Cruz-Erazo v. Rivera-Montañez, 212 F.3d 617, 621 (1st Cir. 2000). The statute, i.e., § 1983 "'is not itself a source of substantive rights, but a method for vindicating federal rights

elsewhere conferred... by the United States Constitution and federal statutes.'" Rodriguez Garcia v. Municipality of Caguas, 354 F.3d 91, 99 (1st Cir. 2004) (citing Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S.C. 2689, 61 L.Ed.2d 433 (1979)). Hence, it is plaintiffs' burden to identify the particular underlying constitutional or statutory right that is sought to be enforced via judicial proceedings.

In order to prevail in a § 1983 claim plaintiff must bring forth evidence that (1) defendant acted "under color of state law" and (2) deprivation of a federally protected right. Rogan v. City of Boston, 267 F.3d 24 (1st Cir. 2001) ; Dimarco-Zappa v. Cabanillas, 238 F.3d 25, 33 (1st Cir. 2001) ; Collins v. Nuzzo, 244 F.3d 246 (1st Cir. 2001) ; Cruz-Erazo, 212 F.3d at 612; Barreto-Rivera, 168 F.3d at 45.

It is beyond peradventure that both FAGUNDO and MUJICA were acting within the scope of their duties as state officials during the process leading to this suit. Under particular circumstances, private actors linked to government action may also be deemed to have acted under color of law for purposes of § 1983. In the process of ascertaining whether "acts by a nominally private entity may comprise state action... [the courts have examined whether] with respect to the activity at issue, the private entity is engaged in a traditionally exclusive public function; is 'entwined' with the government; is subject to government coercion or encouragement; or is willingly engaged in joint action with the government." Logiodice v.

Trustees of Maine Central Inst., 296 F.3d 22, 26 (1st Cir. 2002). Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295-96, 212 S.Ct. 924, 148 L.Ed.2d 807 (2001). See also Perkins v. Londonderry Basketball Club, 196 F.3d 13, 18 (1st Cir. 1999) (phrasing doctrine under "traditional public function", "elaborate financial or regulatory nexus" and "symbiotic relationship".)

Rather than engage in this "fact-sensitive" endeavor, Perkins, 196 F.3d at 18, we shall assume, for purposes of this Order that BARRET & HALE's conduct can be attributed to the state for § 1983 purposes.

Our next step is to ascertain whether plaintiffs were deprived of any federally protected right as a result of the events alleged in the complaint.

Due Process

Plaintiffs claim both procedural and substantive due process violations as a result of the EIS finally approved by the EQB for the aforementioned project. Specifically, plaintiffs contend that the defendants acted contrary to applicable environmental and construction statutes, regulations and manuals in not properly addressing the stormwater discharge issue.

Property Right

In order to establish a due process violation plaintiffs must first establish deprivation of a property right. According to the complaint, plaintiffs' property is affected by water runoff from the

highway project which presents a potential for flooding. They also point to a previous flooding incident. Assuming this situation is sufficient to raise due process concerns, we shall proceed to ascertain whether the aforementioned constitutional guarantee was breached.

Procedural Due Process

The Due Process Clause provides that no state shall "deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, § 1.

In order to properly assert a procedural due process claim under § 1983, plaintiffs must show that: [1] they had a property interest and [2] that defendants, acting under color of state law, deprived them of that property interest without providing them a constitutionally adequate procedure. Licari v. Ferruzzi, 22 F.3d 344, 347 (1st Cir. 1994); Rumford Pharmacy v. City of East Providence, 970 F.2d 996, 999 (1st Cir. 1992); PFZ Properties v. Rodriguez, 928 F.2d 28, 30 (1st Cir. 1991) .

It is not sufficient that a deprivation has occurred. Plaintiffs carry the burden of pointing to the lack of constitutionally sound proceedings at the state level. Rumford, 970 F.2d at 999. Plaintiffs must present evidence that the state does not have available review mechanisms comporting with minimum due process requirements. Zinermon v. Burch, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Otherwise, "[i]f the federal courts were to entertain civil rights

complaints based on procedural deprivations for which adequate state remedies exist, 'every disgruntled applicant could move [its procedural grievances] into the federal courts ...[,] any meaningful separation between federal and state jurisdiction would cease to hold and forum shopping would become the order of the day. '" Rumford, 970 F.2d at 999 (citing Roy v. City of Augusta, Me., 712 F.2d 1517, 1523 (1st Cir.1983)) .

In order to ascertain the adequacy of the procedures available to plaintiffs "'it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure ... effecting the deprivations, and any remedies for erroneous deprivations provided by statute or tort law.'" Licari, 22 F.3d at 347 (citing Zinermon v. Burch, 494 U.S. at 126) .

The issue before this court centers on an attack to the final EIS approved by EQB. Plaintiff has not specifically pointed to the reasons why the administrative proceedings proved inadequate.[4] The events as described by plaintiff resulting in EQB's eventual approval on February 18, 2003, clearly comport with minimum constitutional safeguards. Plaintiffs actively participated in the various stages of the EQB's decision-making process and were allowed ample opportunity

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4 The fact that they were not served copy of PRHTA's final submission does not render the entire process infirm.

to challenge PRHTA's position. Further, there is no indication that judicial review of an improper EIS is not available. *See* Colón-Cortés v. Pesquera, 2000 WL 424713 (whereby the Puerto Rico Supreme Court found the previous EIS deficient and paralyzed construction).

Just because plaintiffs disagree with the legal soundness of the final result does not mean that the process was not a fair one for procedural due process purposes

Plaintiffs have failed to meet their burden to establish that the procedure available for review of PRHTA's EIS is inadequate. Rather, the arguments as presented challenge instead the legal adequacy of presiding officer's determination due to his purported failure to comply with the applicable statutory provisions.

Accordingly, we find that no legal grounds exist to support plaintiffs' procedural due process claim inasmuch as they had available a constitutionally adequate administrative process with potential for judicial review. Thus, the procedural due process claim is therefore **DISMISSED.**

Substantive Due Process

Even though the due process clause refers only to procedural safeguards, it is settled that it also "contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon, 494 U.S. at 125 (citing Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Procedural due process requires that a proceeding which results in a deprivation of property be a fair one whereas substantive due process guards against arbitrary and capricious government actions. Licari, 22 F.3d at 347.

The courts have consistently held that substantive due process claims are limited to extreme cases and "the threshold for establishing the requisite 'abuse of government power' is a high one indeed." Licari 22 F.3d at 350 (citing Nestor Colón-Medina & Sucrs., Inc. v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992)). "A viable substantive due process claim requires proof that the state action was in and of itself egregiously unacceptable, outrageous, or conscience-shocking". Licari, 22 F.3d at 347 (internal quotation marks and citation omitted); Cruz-Erazo, 212 F.3d at 622. *See also*, Nestor Colón-Medina, 964 F.2d at 45 (substantive due process mechanism limited to "truly horrendous situations").

In describing which action "shocks the conscience" for substantive due process purposes, "[i]t has been said, for instance, that substantive due process protects individuals against state actions which are 'arbitrary and capricious,' or those that run counter to 'the concept of ordered liberty,' or those which, in context, appear 'shocking or violative of universal standards of decency.'" Cruz-Erazo, 212 F.3d at 622 (citing Amsden v. Moran, 904 F.2d 748, 753-54 (1st Cir. 1990) .

Deprivations resulting from negligent acts or omissions on the part of state officers are not actionable under due process provisions. Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). Nor is substantive due process protection triggered by merely unsound or erroneous government decisions. Its use is limited to those specific instances involving egregious abuse of governmental power which the courts find shocking. Collins v. City of Harker Heights, 502 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) .

Additionally, "violations of state law - even where arbitrary, capricious, or undertaken in bad faith - do not, without more, give rise to a denial of substantive due process". Coyne v. City of Somerville, 972 F.2d 440, 444 (1st Cir. 1992). "The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." PFZ Properties, 928 F.2d at 31-2 (citations and internal brackets and quotation marks omitted).

The very nature of this constitutional protection has caused that substantive due process protection be used sparingly. "Courts should guard against unduly expanding the concept of substantive due

process 'because guideposts for responsible decisionmaking in this unchartered area are scarce and open ended'". South County Sand & Gravel Co., Inc. v. Town of South Kingstown, 160 F.3d 834, 835 (1st Cir. 1998) (citing Collins v. City of Harker Heights, 503 U.S. at 125). Substantive due process, as a theory for constitutional redress, has in the past fifty years been disfavored, in part because of its virtually standardless reach." Nestor Colon-Medina, 964 F.2d at 45; Licari, 22 F.3d at 350.

Further, in situations where plaintiffs are protected from undue interference from state actions by specific constitutional guarantees "they must assert their claims under that particular constitutional rubric instead of invoking the more generalized notion of substantive due process." South County Sand & Gravel, 160 F.3d at 835.

Regardless of how plaintiffs phrase their claims,[5] after a careful reading of the complaint their allegations can be summarized as their disagreement with the EQB's interpretation of the law regarding the drainage issue. However, the events as related in the pleadings do not meet the extreme circumstances warranted for a substantive due process action to prevail under § 1983. Even assuming, arguendo, that plaintiffs' interpretation of the law is correct and that the EQB erroneously approved the EIS this is

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5 We do not take a position as to whether the adverse effects of the government's action on plaintiffs' property may constitute a Fifth Amendment "taking". See Ortega Cabrera v. Municipality of Bayamon, 562 F.2d 91 (1st Cir. 1977).

insufficient for a viable substantive due process claim. The conduct by the defendants and the proceedings leading to the final EIS approval as related by plaintiffs do not rise to the level of an "egregious abuse of governmental power" which is shocking to the court as demanded by judicial precedent.

Accordingly, the substantive due process claims are likewise **DISMISSED.**

Conclusion

Based on the foregoing, the court finds that plaintiffs have failed to assert a procedural or substantial due process claim under § 1983 and hence, the complaint is hereby **DISMISSED.**[6]

Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 18th day of March, 2004.

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6 Because the court finds that plaintiffs have failed to meet their burden under § 1983 there is no need to address the specific alternate issues raised by defendants in their respective motions to dismiss. *See* PRHTA's Motion for Dismissal (docket No. 7) and Memorandum (docket No. 8); BARRET & HALE's Motion to Dismiss (docket No. 16); BARRET & HALE's joinder (docket No. 21); MUJICA's Motion to Dismiss (docket No. 29). *See also,* Plaintiffs' Oppositions (docket Nos. 17, 23 and 30).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

EZEQUIEL CASTRO RIVERA, et al., Plaintiffs,

v.

FERNANDO FAGUNDO, et al., Defendants.

CIVIL NO. 03-1287 (RLA)

JUDGMENT

The court having dismissed the claims asserted in the complaint through its Order issued on this date, it is hereby

ORDERED AND ADJUDGED that the complaint be and the same is hereby **DISMISSED.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 18th day of March, 2004. 18

S/Raymond L. Acosta

RAYMOND L. ACOSTA
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

EZEQUIEL CASTRO RIVERA, et al.,

Plaintiffs,

v.

Puerto Rico Highway and Transportation Authority, et al.,

Defendants.

CIVIL NO. 00-1970 (RLA)

Order Dismissing Improper Drainage Claims And Local Causes Of Action

On January 17, 2003, the court dismissed the expropriation related claims asserted by plaintiffs in this case[1] as well as the claims filed against various privately-owned entities.[2] The court further instructed plaintiffs to show cause why the constitutional deprivation claims for allegedly improper drainage claims should not be likewise dismissed

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1 *See* Order Dismissing Expropriation-Related Claims (docket No. 24 146) .

2 See Order Dismissing Claims Asserted against Private Defendants and Setting Deadline for Plaintiffs to Show Cause 26 Regarding Improper Drainage Claim (docket No. 149)

The court having reviewed the arguments submitted on plaintiffs' behalf[3] hereby finds that the claims presented do not rise to a constitutional level actionable under 42 U.S.C. § 1983.[4]

PROCEDURAL BACKGROUND

As previously related in our Order issued on January 17, 2003 (docket No. 146) the genesis of this litigation lies with the plans and development of an ambitious government project denominated Highway PR-66 which was expected to run between the Municipalities of Canóvanas and Carolina to alleviate serious traffic congestion along this route.[5]

Plaintiffs, MR. and MRS. EZEQUIEL CASTRO RIVERA,[6] instituted this action asserting both constitutional and tortious claims against the

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3 *See* Response (docket No. 155). A controversy ensued regarding *pro se* representation and the court initially required that plaintiffs continue to appear through counsel. In order to dispose of the outstanding legal issues the court will proceed with the submissions of RAMON CASTRO on behalf of all parties with a property interest on the plot of land in question.

4 A subsequent suit based on essentially the same facts was filed against FERNANDO FAGUNDO, incoming director of the PUERTO RICO HIGHWAY AUTHORITY ("PRHTA") in his personal capacity, the PRHTA, ESTEBAN MUJICA, an officer of the PUERTO RICO ENVIRONMENTAL QUALITY BOARD ("EQB") and BARRET & HALE, project designer, challenging the Environmental Impact Statement ("EIS") as procedurally flawed. *See* Ezequiel Castro Rivera v. Fernando Fagundo, Civ. No. 03-1287 (RLA).

5 This project has generated great controversy in the local forum due to environmental issues. As a result construction was paralyzed by the Puerto Rico Supreme Court. See Colón-Cortés v. Pesquera, 2000 P.R.-Eng. 424713, 2000 WL 424713 (April 19, 2000).

6 MR. RIVERA has since been substituted by his heirs. See 26 Motion for Substitution of Party (docket No. 127).

PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY (PRHTA), various of its officials as well as the contractor, plan designer and project manager of PR-66.

Plaintiffs' claims in this case are two-fold. First, they challenge the procedure leading up to the expropriation of part of their property located along the way of the aforementioned route which expropriation is currently pending in local court. Additionally, they contend that a water drainage of the PR-66 project was improperly constructed resulting in the discharge of a large volume of water on their property when it rains.

The expropriation claims were dismissed. At this time we review those allegations specifically dealing with the improper drainage claim under constitutional due process standards.[7]

The court will examine plaintiffs' remaining claims pursuant to the provisions of Rule 12(b)(1) Fed. R. Civ. P. Accordingly, it will accept all well-pleaded allegations of the complaint as true and indulge all reasonable inferences therefrom in plaintiffs' favor.

7 Plaintiffs' claim is summarized at ¶ 9 of their Response (docket No. 155) they states:

> The Improper Drainage is the improper diversion of stormwater from the PR-66 project onto Plaintiff's property; and is the result of PRHTA's Over-Arching Policy of Callous Indifference to Citizens' Civil rights while acting jointly with other Codefendants.

Deniz v. Municipality of Guaynabo, 285 F.3d 142, 144 (1st Cir. 2002); Valentin v. Hosp. Bella Vista, 254 F.3d 358, 365 (1st Cir. 2001).

Plaintiffs' claims regarding improper drainage essentially trace those alleged in Civ. No. 03-1287. Plaintiffs challenge the adequacy of the process leading to PRHTA's EIS approved by the EQB which, according to them runs contrary to the applicable environmental statutes and PRHTA's regulations insofar as drainage requirements is concerned.

Section 1983

Section 1983 does not create substantive rights but is rather a procedural mechanism for enforcing constitutional or statutory rights. Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); Cruz-Erazo v. Rivera-Montañez, 212 F.3d 617, 621 (1st Cir. 2000). The statute, i.e., § 1983 "'is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred... by the United States Constitution and federal statutes.'" Rodriguez Garcia v. Municipality of Caguas, 354 F.3d 91, 99 (1st Cir. 2004) (citing Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S.C. 2689, 61 L.Ed.2d 433 (1979)). Hence, it is plaintiffs' burden to identify the particular underlying constitutional or statutory right that is sought to be enforced via judicial proceedings.

In order to prevail in a § 1983 claim plaintiff must bring forth evidence that (1) defendant acted "under color of state law" and (2)

deprivation of a federally protected right. Rogan v. City of Boston, 267 F.3d 24 (1st Cir. 2001) ; Dimarco-Zappa v. Cabanillas, 238 F.3d 25, 33 (1st Cir. 2001) ; Collins v. Nuzzo, 244 F.3d 246 (1st Cir. 2001) ; Cruz-Erazo, 212 F.3d at 612; Barreto-Rivera, 168 F.3d at 45.

There is no controversy over the fact that the remaining named defendants in this case were acting within the scope of their duties as state officials at all relevant times. Therefore, the first element is satisfied. We must then ascertain whether plaintiff was deprived of any federally protected right as a result of the events alleged in the complaint.

Due Process

Plaintiffs claim both procedural and substantive due process violations. Specifically, plaintiffs contend that the defendants acted contrary to applicable environmental and construction statutes, regulations and manuals in not properly addressing the stormwater discharge issue.

Property Right

In order to establish a due process violation plaintiffs must first establish deprivation of a property right. According to the complaint, plaintiffs' property is affected by water runoff from the highway project which presents a potential for flooding. They also point to a previous flooding incident. Assuming this situation is sufficient to raise due process concerns, we shall proceed to

ascertain whether the aforementioned constitutional guarantee was breached.

Procedural Due Process

The Due Process Clause provides that no state shall "deprive any person of life, liberty or property without due process of law." U.S. Const. amend. XIV, § 1.

In order to properly assert a procedural due process claim under § 1983, plaintiffs must show that: [1] they had a property interest and [2] that defendants, acting under color of state law, deprived them of that property interest without providing them a constitutionally adequate procedure. Licari v. Ferruzzi, 22 F.3d 344, 347 (1st Cir. 1994); Rumford Pharmacy v. City of East Providence, 970 F.2d 996, 999 (1st Cir. 1992); PFZ Properties v. Rodriguez, 928 F.2d 28, 30 (1st Cir. 1991).

It is not sufficient that a deprivation has occurred. Plaintiffs carry the burden of pointing to the lack of constitutionally sound proceedings at the state level. Rumford, 970 F.2d at 999. Plaintiffs must present evidence that the state does not have available review mechanisms comporting with minimum due process requirements. Zinermon v. Burch, 494 U.S. 113, 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). Otherwise, "[i]f the federal courts were to entertain civil rights complaints based on procedural deprivations for which adequate state remedies exist, 'every disgruntled applicant could move [its procedural grievances] into the federal courts ...[,] any meaningful

separation between federal and state jurisdiction would cease to hold and forum shopping would become the order of the day.'" Rumford, 970 F.2d at 999 (citing Roy v. City of Augusta, Me., 712 F.2d 1517, 1523 (1st Cir. 1983)) .

In order to ascertain the adequacy of the procedures available to plaintiffs "'it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure ... effecting the deprivations, and any remedies for erroneous deprivations provided by statute or tort law.'" Licari, 22 F.3d at 347 (citing Zinermon v. Burch, 494 U.S. at 126) .

The issue before this court centers on an attack to the EIS-related administrative proceedings. Plaintiff has not specifically pointed to the reasons why the administrative proceedings have proven inadequate. The court takes judicial notice of the allegations in Civ. No. 03-1287 regarding the procedure leading to EQB's eventual approval of PRHTA's proposed EIS on February 18, 2003 and find these clearly comport with minimum constitutional safeguards. Plaintiffs actively participated in the various stages of the EQB's decisionmaking process and were allowed ample opportunity to challenge PRHTA's position. Further, there is no indication that judicial review of an improper EIS is not available. *See* Colón-Cortés v.

Pesquera, 2000 WL 424713 (whereby the Puerto Rico Supreme Court found the previous EIS deficient and paralyzed construction).

Just because plaintiffs disagree with the legal soundness of the final result does not mean that the process was not a fair one for procedural due process purposes. Thus, we conclude that plaintiffs have failed to meet their burden to establish that the procedure available for review of PRHTA's EIS is inadequate.

Accordingly, we find that no legal grounds exist to support plaintiffs' procedural due process claim inasmuch as they had available a constitutionally adequate administrative process with potential for judicial review. Thus, the procedural due process claim is therefore **DISMISSED.**

Substantive Due Process

Even though the due process clause refers only to procedural safeguards, it is settled that it also "contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon, 494 U.S. at 125 (citing Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Procedural due process requires that a proceeding which results in a deprivation of property be a fair one whereas substantive due process guards against arbitrary and capricious government actions. Licari, 22 F.3d at 347.

The courts have consistently held that substantive due process claims are limited to extreme cases and "the threshold for establishing the requisite 'abuse of government power' is a high one indeed." Licari 22 F.3d at 350 (citing Nestor Colón-Medina & Sucrs., Inc. v. Custodio, 964 F.2d 32, 45 (1st Cir. 1992)). "A viable substantive due process claim requires proof that the state action was in and of itself egregiously unacceptable, outrageous, or conscience-shocking". Licari, 22 F.3d at 347 (internal quotation marks and citation omitted); Cruz-Erazo, 212 F.3d at 622. *See also,* Nestor Colón-Medina, 964 F.2d at 45 (substantive due process mechanism limited to "truly horrendous situations").

In describing which action "shocks the conscience" for substantive due process purposes, "[i]t has been said, for instance, that substantive due process protects individuals against state actions which are 'arbitrary and capricious,' or those that run counter to 'the concept of ordered liberty,' or those which, in context, appear 'shocking or violative of universal standards of decency.'" Cruz-Erazo, 212 F.3d at 622 (citing Amsden v. Moran, 904 F.2d 748, 753-54 (1st Cir. 1990) .

Deprivations resulting from negligent acts or omissions on the part of state officers are not actionable under due process provisions. Davidson v. Cannon, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). Nor is substantive due process protection triggered by merely unsound or erroneous government decisions. Its

use is limited to those specific instances involving egregious abuse of governmental power which the courts find shocking. Collins v. City of Harker Heights, 502 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) .

Additionally, "violations of state law - even where arbitrary, capricious, or undertaken in bad faith - do not, without more, give rise to a denial of substantive due process". Coyne v. City of Somerville, 972 F.2d 440, 444 (1st Cir. 1992). "The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." PFZ Properties, 928 F.2d at 31-2 (citations and internal brackets and quotation marks omitted).

The very nature of this constitutional protection has caused that substantive due process protection be used sparingly. "Courts should guard against unduly expanding the concept of substantive due process 'because guideposts for responsible decisionmaking in this unchartered area are scarce and open ended'". South County Sand & Gravel Co., Inc. v. Town of South Kingstown, 160 F.3d 834, 835 (1st

Cir. 1998) (citing Collins v. City of Harker Heights, 503 U.S. at 125). Substantive due process, as a theory for constitutional

redress, has in the past fifty years been disfavored, in part because of its virtually standardless reach." Nestor Colon-Medina, 964 F.2d at 45; Licari, 22 F.3d at 350.

Further, in situations where plaintiffs are protected from undue interference from state actions by specific constitutional guarantees "they must assert their claims under that particular constitutional rubric instead of invoking the more generalized notion of substantive due process." South County Sand & Gravel, 160 F.3d at 835.

Regardless of how plaintiffs phrase their claims, after a careful reading of the complaint their allegations can be summarized as their disagreement with the EQB's interpretation of the law regarding the drainage issue. However, the events as related in the pleadings do not meet the extreme circumstances warranted for a substantive due process action to prevail under § 1983. Even assuming, arguendo, that plaintiffs' interpretation of the law is correct and that the EQB erroneously approved the EIS this is insufficient for a viable substantive due process claim. The conduct by the defendants and the proceedings leading to the final EIS approval as related by plaintiffs do not rise to the level of an "egregious abuse of governmental power" which is shocking to the court as demanded by judicial precedent.

Accordingly, the substantive due process claims are likewise **DISMISSED.**

Supplemental Jurisdiction

The court having dismissed the federal claims pursuant to 28 U.S.C. § 1367 (c) (3) it declines to exercise supplemental jurisdiction over the negligence state law claims.

Conclusion

Based on the foregoing, the court finds that plaintiffs have failed to assert a procedural or substantial due process claim under § 1983 and hence, these are hereby **DISMISSED.**

The negligence state claims asserted under supplemental jurisdiction are also **DISMISSED.**

Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 18th day of March, 2004.

S/Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

EZEQUIEL CASTRO RIVERA, et al.,

Plaintiffs,

v.

Puerto Rico Highway and Transportation Authority, et al.,

Defendants.

CIVIL NO. 00-1970 (RLA)

Order Dismissing Expropriation-Related Claims

Defendants 1 have moved the court to dismiss the claims asserted against them. The court having reviewed the arguments submitted by the parties as well as the documents in file hereby rules as follows.

BACKGROUND

The '. genesis of this litigation lies with the plans and the development of an ambitious government project denominated Highway PR-66 which was expected to run between the Municipalities of Canóvanas and Carolina to a11eviate serious traffic congestion along this route. 2

1 The motion was submitted by PRHTA and the request adopted by codefendants WALTEB RIVERA (docket No. 32), SERGIO GONZALEZ and ANGEL RIVERA-SALAS (docket No. 34) and RIO CONSTRUCTION (docket No. 35).

2 This project has generated great controversy in the local forum due to environmental issues. As a result construction was paralyzed by the _Puerto Rico Supreme Court. See Colón-Cortes v. Pesquera, *2000* P.R. -Eng. 424713, 2000 WL 424713 (April 19, 2000)

Plaintiffs,. and MRS, EZEQU!EL CASTRO RIVERA, instituted this action asserting both constitutional and tortious claims against the PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY (PRHTA), various of its officials as well as the contractor, plan designer and project manager of PR-66.Plaintiffs' claims are two-fold, First, they challenge the procedure leading up to the expropriation of part of their property located along the way of the aforementioned route which expropriation is currently pending in local court. Additionally, they contend that a water drainage of the PR-66 project was improperly constructed resulting in the discharge of a large volume of water on their property when it rains.

In the motion presently before the court defendants seek to dismiss those claims pertaining to the expropriation of a portion of their land.

The court will entertain defendants' motion to dismiss pursuant to the provisions pf Rule 12(b) (1) Fed. R. *Civ.* P. Accordingly, it will accept all well-pleaded allegations of the complaint as true and indulge all reasonable inferences therefrom in plaintiffs' favor. Deniz v, Municipality of Guaynabo, ,285 F.3d 142, 144 (1st Cir. 2002); Valentin v, Bella Vista, 1541 F.3d 158, 365 (1st Cir. 2001).

MR. RIVERA has since been substituted by his heirs. See Motion for Substitution of Party (docket No. 127).

Expropriation-Related Claims

On June 30, 1998 the PRHTA instituted eminent domain proceedings for the taking of 2.2422 "cuerdas" of the plaintiffs' 4 and posted the sum of $56,055.00 as compensation therefor. Plaintiffs challenged the adequacy of this sum. The local condemnation proceedings are still ongoing pending resolution of the adequate compensation issue.

The expropriation-related claims charge both a Fifth Amendment takings claim and a substantive due process violation pursuant to 42 USC. § 1983. In support thereof plaintiffs contend that the comparable sales utilized by PRHTA for valuation of the expropriated tract of land do not comport with the applicable legal provisions which resulted in a deficient compensation amount being offered instead. Further, they argue that during the administrative phase leading to the expropriation suit PRHTA, through its agents, failed to abide by its obligation to deal in good faith. The Fifth Amendment to the, U.S. Constitution protects owners from deprivation of their property without. just compensation. As the provision clearly indicates, it "does not proscribe taking of property; it proscribes taking *without just compensation."* Williamson County Reg"l Planning Com'n 'v. Hamilton Bank, 473 U.S. 172, 194, 105 S.Ct 3108, 87 L.Ed.2d 126: (1985) (italics supplied);

4.According to the pleadings plaintiffs' original property consisted of approximately 15 cuerdas. Complaint p.2.

Deniz, 285 F3d at 146; Culebras Enter. I Corp. v. Rivera-Rios, 813 F2d 506, 515 (pt Cir. 1987).

> [B]ecause the; Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Wlll1amson, ! 473 U.S. at 195; Culebras Enter., 813 F.2d at 516..

The courts have been particularly, keen on safeguarding the ripeness requirement in cases involving Fifth Amendment claims. In suits involving taking of property ripeness principles require that final, determination be made at the local level prior to federal courts venturing into matters related to compensation.

The ripeness requirement may be avoided in those cases where the remedies; provided at the local level are either unavailable or inadequate". Williamson, 473 US at 196-197; Deniz, 285 F.3d at 146;Gilbert-v. City of Cambridge., 932 F.2d 51, 65 (1"" Cir. 1991). However, this exception *is* narrowly construed, and the claimant must

carry the heavy burden of showing unavailability or inadequacy." Deniz, 285 at 146.

Plaintiffs contend that the remedies available in the pending eminent domain action will prove inadequate because the do not allow for compensation of the fees the will pay counsel in the process of contesting the amount offered for the expropriated land. We find the argument unconvincing and decline to find that attorneys fees constitute an integral part of the just compensation constitutional mandate. Further, even assuming Plaintiffs' argument is correct, failure to pay for legal fees does not necessarily render the entire local proceeding inadequate to the point of warranting their avoidance altogether.

Plaintiffs further challenge the adequacy of the pending local proceedings arguing that the government took possession of their property upon deposit of "an arbitrary and paltry amount". Complaint p.40. All the takings clause requires, however, is that a mechanism be in place for determination of the reasonable value of the expropriated land.

[T]he Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with the taking all that is required is that a reasonable, certain and adequate provision for obtaining compensation at the time of the taking. If government has provided an adequate process for obtaining compensation and

if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking.

Williamson,, 473 US at 194 (citations, internal quotations and brackets omitted).

CONCLUSION

Plaintiffs characterize p art of their claims as a substantive due process deprivation the essence of their grievance as described lies with the fact that the amounts proferred as fair compensation in the eminent domain proceedings are inadequate. Thus, the substantive due process violation is premised on the same facts used to support their takings claim.

Dressing a takings claim in the raiment of a due process violation does not serve to evade the exhaustion requirement. Here... the... condemnation remedy represents an arguably available and adequate means of obtaining compensation for the alleged taking... Thus no substantive due process claim will lie until that remedy is exhausted. Deniz, 285 F3d at 149.

Both the taking and substantive due process claims are inextricably intertwined. It is difficult to conceive how we may proceed to make determination of the correct valuation of the condemned property when that is the very issue the local expropriations court must determine. "It would be duplicative for a

federal court to assess damages on a due process theory while a commonwealth of Puerto Rico court was in the process of awarding just compensation for the same taking". Culebras Enter. Corp. v. Rivera-Rios, 813 F.2d 506, 516 (1st cir 1987)

Based on the foregoing defendants' request is GRANTED 5. Accordingly, we find that the expropriation-related federal claims are not ripe for: adjudication and therefore, they are hereby

DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

IT IS *SO* ORDERED.

San Juan, Puerto Rico, this 16th day of January, 2003

S/Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

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5 See PRHTA's motion-to-dismiss [docket-No. 64]; plaintiffs' opposition [Docket-No. 65]; PRHTA's reply [Docket-No. 66] and Plaintiffs' sur-replay [Docket-No. 67]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

EZEQUIEL CASTRO RIVERA, et al.,

Plaintiffs,

v.

Puerto Rico Highway and Transportation Authority, et al.,

Defendants.

CIVIL NO. 00-1970 (RLA)

Judgment Dismissing Expropriation-Related Claims

The court having dismissed plaintiffs' expropriation-related claims through its Order issued on this date, it is hereby ORDERED AND ADJUDGED that expropriation-related federal claims 16 asserted are not in the complaint ripe for adjudication and therefore, they are hereby **DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.**

IT IS SO ORDERED.

San Juan, Puerto Rico, this 16th day of January, 2003

S/Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

EZEQUIEL CASTRO RIVERA, et al.,

Plaintiffs,

v.

Puerto Rico Highway and Transportation Authority, et al.,

Defendants.

CIVIL NO. 00-1970 (RLA)

ORDER DENYING PRELIMINARY INJUNCTION PETITION

This action was instituted by the owners of a tract of land expropriated by the PUERTO RICO HIGHWAYS AND TRANSPORTATION AUTHORITY (PRHTA) for the development of PR-66 Highway. The complaint alleges violations to the takings clause as well as due process of law. Plaintiffs have moved the court to enter a preliminary injunction enjoining the PRHTA from submitting an allegedly improper Environmental Statement (EI8) to the local ENVIRONMENTAL QUALITY BOARD (EQB) in relation to the PR-66 Highway project. In support of their request plaintiffs argue that the aforementioned EIS contravenes the determination made by the Puerto Rico Supreme Court with regard to the project in two opinions issued disposing of environmental challenges to the PR-66 Highway construction. See Colon Cortes v. Pesquera, 2000 P.R.-Eng. 424713, 2000 WL 424713 (April 19, 2000) and Colon-Cortes v. Pesquera, 99 TSPR 85, 1999 WL 371676 (June 2nd 1999)

The court agrees with PRHTA's opposition to the petition on the grounds that we have no jurisdiction to entertain plaintiffs' request.

First, as plaintiffs themselves concede in their motion, the order purportedly breached was issued by Puerto Rico the Supreme Court. Further, as specifically pointed out by the Puerto Rico Supreme Court in Colon Cortes v. Pesquera, 99 TSPR 85, 1999 WL 371676 the proper remedy for attacking the adequacy of an EIS is by seeking relief before the Puerto Rico EQB in accordance with the procedure set forth in 12 P.R. Laws Ann. 10 §1134 (1997) and the pertinent regulations issued by said agency which provide for judicial review of the administrative determination.

Based on the foregoing, we find that this Court lacks jurisdiction to entertain plaintiffs' request. Accordingly, petition the for . preliminary injunction is hereby DENIED:2'\

IT IS SO ORDERED.

San Juan, Puerto Rico, this 16th day of January, 2003

S/Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

1 According to the motion, "it is shocking to observe that PRHTA has yet again disregarded the instructions of the Supreme Court of P.R., and submitted an Improper EIS-P.H (Docket No. 114 _ 2).

2 See Verified Motion for Preliminary Injunction... (docket No. 114); Motion to Issue Unopposed Request for Injunction (docket No. 116); Opposition to Plaintiff's Request for Injunction (docket No. 117); Reply to PRHTA's Opposition... (docket No. 121); Request to Set Aside Plaintiff's Reply... (docket No. 124); Motion Informing that EQB Stopped Project... (docket No. 128) and Additional Motion for Oral Hearing (docket No. 131)

Relevant Statutes:

Fourteenth Amendment
-Due Process Clause
-Equal Protection of the Law

First Amendment
- Freedom of Speech
- Right to Seek Redress

Seventh Amendment
- Right to Trial by Jury

42 USC §1983

FIRREA (12 U.S.C. §§3310, 3331-3351)

Uniform Standards of
Professional Appraisal Practice

PR Laws T9 §2009(e)

PR Laws T12 §701

PR Laws T12 §1124

- See Complaint 03-1287 RLA-Standards of Evaluation

PR Laws T12 §1136(e)

- See Complaint 03-1287 RLA -Standards of Evaluation

PR Laws T20 Chapter 75

PR Laws T32 §2902

PRHTA Highway Design Manual

PRHTA's Regulation No. 4413

Case No. /Judgment	Comments
Case 00-1970 RLA	
Docket-No. 145 Abandon Jurisdiction on the Improper EIS	ORDER: "We find that this Court lacks jurisdiction to entertain plffs' request." (see Docket) Clear Error in disregard of: Patsy v. Board of Regents, 102 S.Ct. 2557 (1982) NO mention of the Equal Protection of the Law
Docket-No. 147 No Subject Matter Jurisdiction	"JUDGMENT dismissing expropriation-related claims for lack of subject matter jurisdiction." (see Docket) NO such expropriation-related claims; instead, fabrications by PRHTA. NO decision on Pre-Deprivation Due Process Violation NO decision on the Improper Drainage NO mention of the Equal Protection of the Law Misapplication of Williamson County v. Hamilton Bank, 473 U.S. 172 (1985)

Docket-No. 149 No Jurisdiction	"ORDER granting [107-1] motion to Dismiss for Lack of Jurisdiction filed by Greiner Caribe, Rio Construction & Barret & Hale." (see Docket) Misapplication of the State Action Doctrine NO mention of the Equal Protection of the Law
Docket-No. 174 No Jurisdiction Irrational; Moot; Contradiction	"The court will examine plaintiffs' remaining claims pursuant to the provisions of Rule 12(b)(1) Fed. R. Civ. P. [Jurisdiction]" (page 3) Improper reference to Jurisdiction and forum shopping (page 9) Irrational: attempts to dismiss the Improper Drainage claims for case 00-1970 RLA, without even addressing the issue and on the basis of irrational reference to other incongruous events. Moot: the Order completely disregards the fact the entire project PR-66 project was still enjoined at that time; and that a new legally constituted "Eastern Corridor" project with a new incarnation and a new configuration of the Improper Drainage was in the process of construction. Contradiction: the new incarnation of the Improper Drainage contradicts PRHTA's

	position on the entire issue, and calls for a Judgment by DEFAULT against the relevant Codefendants on this matter. NO mention of the Equal Protection of the Law
Case 03-1287 RLA Docket-No. 48 No Jurisdiction	"The court is called upon at this time to examine [...] whether or not jurisdiction has been properly asserted by plaintiffs. [first sentence Docket-No. 48] Improper reference to Jurisdiction and forum shopping (page 10). NO Dismissal of the new incarnation of the Improper Drainage. NO Dismissal of PRHTA, Codefendant Fagundo or Codefendant Barrett & Hale – nor of their violations of Environmental Law. NO mention of the Equal Protection of the Law